

No. 14917.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee of the Estate of Columbia
Stamping and Manufacturing Corporation, Bankrupt,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Statement of the Case.

The appellee accepts the appellant's statement of the case.

We note, however, that the opinion of the District Court was not inserted in the record and have placed same in Appendix "A" (p. 1).

Summary of Argument.

A. The Bankruptcy Court had jurisdiction *to determine* (1) whether any liability or duty under the Use Tax Law* existed on part of the Trustee in Bankruptcy, arising from the sale in liquidation, and (2) whether any injunctive relief should be granted.

B. The Bankruptcy Court properly decided that the Trustee had neither liability for any tax or debt under the Use Tax Law nor any duty to collect such tax or debt.

(1) A Trustee is not a “retailer” when he makes a liquidation sale.

(2) Liability under the Use Tax Law is based upon acquisition from a “retailer”.

(3) Liability under the Use Tax Law is exempted if for Constitutional reasons no sales tax could have been assessed.

(4) Liability under the Use Tax Law is exempted in respect to property purchased from any unincorporated agency or instrumentality of the United States (with exceptions not material).

(5) A requirement to pay or collect any tax or debt based on the Use Tax Law would constitute an interference with bankruptcy administration.

(6) The property involved is exempt as an “occasional” sale.

C. Conclusion.

*In Appendix “B” (p. 2) are all cited sections. Unless otherwise noted, all cited sections refer to Sale and Use Tax Law contained in California Revenue and Taxation Code, Section 6001 *et seq.*

ARGUMENT.

A. The Bankruptcy Court Had Jurisdiction to Determine Whether Any Liability or Duty Under the Use Tax Existed on Part of the Trustee in Bankruptcy, Arising From the Sale in Liquidation, and Whether Any Injunctive Relief Should Be Granted.

The question of the jurisdiction of the Bankruptcy Court *to determine* the liability and duty of the Trustee and the related rights of the State of California and to issue injunctive relief were clearly disposed of by this Honorable Court in *California State Board of Equalization v. Goggin*, 191 F. 2d 726. The instant case contains an additional feature not found in the cited case, *i. e.*, injunctive provisions relating to the purchaser, Milton J. Wershow Co. As will later appear, it is apparent that the failure to enjoin the appellant in that connection would leave at loose ends the administration of the bankruptcy estate and would be a continuing threat to prospective purchasers at all liquidation sales. The Bankruptcy Court has the right to protect its own officers (*Goggin* case, *supra*) and its own orders. Under some conditions, where it is impossible to administer completely the estate of the bankrupt without determining a controversy between third parties a Bankruptcy Court has jurisdiction to determine a dispute between third parties. (*Reconstruction Finance Corporation v. Riverview State Bank*, 217 F. 2d 455 and *Central States v. Luther*, 215 F. 2d 38.) See also *Matter of Evarts v. Eloy Gin*, 204 F. 2d 712 (9th Cir. 1953), where, however, it appeared that the controversy did not affect the administration of the bankruptcy proceeding.

If this Court should affirm the lower court without including the injunctive relief concerning the purchaser, the

State would nevertheless proceed against the purchaser in face of a holding by the Bankruptcy Court that no Use Tax Law liability arose from the liquidation sale. Many prospective purchasers would be deterred from purchasing at a liquidation sale.

The State contends that the Trustee should have collected a Use Tax (debt) arising because of Section 6204. Such a tax or debt would be an expense of administration and subject to the summary jurisdiction of the Bankruptcy Court. (See Sec. 62a of the *Bankruptcy Act*, 11 U. S. C. A. 102(a); and *McColgan v. Maier Brewing Co.* (9th Cir.), 134 F. 2d 385, 53 Am. B. R. (N. S.) 90.)

In order for the Bankruptcy Court to determine that no liability existed against the Trustee, that Court necessarily would be required to determine that no use tax could be imposed at all, whatever might be the reason for its ruling, whether on constitutional grounds, or that "retailer" did not include a liquidating Trustee.

Whether a use tax or debt was proper would determine the amount of money which the Trustee should collect from the purchaser. (See Sec. 6203.)

It would seem that for the Court to make a complete determination, the necessary parties would be the State, the Trustee, and the purchaser in which event the Court's order would bind all parties.

If separate proceedings were taken, two parties at a time, the Bankruptcy Court might determine in a proceeding between only the State and the Trustee that the use tax was payable, in which event the Trustee would be required to pay "the debt." If the Trustee then proceeded against the purchaser only, it might be determined that no use tax was payable.

Obviously all three parties are necessary for a proper adjudication of the rights of each, from which it must follow that the injunctive relief affecting the purchaser was properly granted.

B. The Bankruptcy Court Properly Decided That the Trustee Had Neither Liability for Any Tax or Debt Under the Use Tax Law Nor Any Duty to Collect Such Tax or Debt.

(1) A Trustee in Bankruptcy Is Not a "Retailer" When He Makes a Liquidation Sale.

Section 6201 imposes the tax on the use of personal property purchased *from any retailer*.

It follows that if the Trustee was not a "*retailer*", no liability existed against anyone, either the Trustee or his vendee.

This Court in the *Goggin* case, *supra*, has positively held that even though the Trustee had been operating a business previously he was not subject to sales taxes based on liquidation sales of personal property pursuant to Court order. The State contended, as here, that the Trustee was a "*retailer*" and subject to sales taxes because he had previously operated the business and was subject to the provisions of Title 28 U. S. C. A. 960 (formerly Title 28 U. S. C. A. 124a). The Court applied its previous rulings in *State Board of Equalization v. Boteler* (1932), 131 F. 2d 386, in which it had stated that a Trustee while liquidating property was not a "*retailer*."

Of necessity the ruling in the *Goggin* case was based on either or both of two propositions:

(1) That the term "*retailer*" as used in the sales and Use Tax Act did not include a Trustee in Bankruptcy *while making liquidation sales*, or

(2) If the term "retailer" did include a Trustee in Bankruptcy while making liquidating sales, such inclusion was unconstitutional to the extent that it affected such liquidating sales.

In either event a Trustee would not be a "retailer."

In passing may it be noted that the State Board of Equalization in its own annotated edition of Revenue Laws of California (1955) at page 302 makes the following interpretation of a Trustee's status as a "retailer" in respect to liquidation sales.

"Trustee in Bankruptcy as 'retailer'.—A Trustee in bankruptcy who is selling the physical equipment of the bankrupt business, but is not conducting or continuing such business, is not a 'retailer', and is not subject to payment of sales tax upon sales made by him in liquidation of the assets of the bankrupt estate. State Board of Equalization v. Boteler, 131 Fed. 2d 386; California State Board of Equalization v. Goggin, 191 Fed. 2d 726, cert. den., 342 U. S. 909."

The cases cited by appellant, including *Market Street Railway Company v. California Board of Equalization*, 137 A. C. A. 100, 290 P. 2d, and *Sutter Packing Company v. California Board of Equalization*, 139 A. C. A. 983, 294 P. 2d 1083, do not involve the status of a Trustee in Bankruptcy while liquidating assets pursuant to order of the Bankruptcy Court. It might just as well be argued that a Sheriff on execution sale is liable to such taxes.

(2) Liability Under the Use Tax Law Is Based Upon Acquisition From a "Retailer."

An examination of the Sales and Use Tax Law as well as the arguments set forth by the appellant will disclose that before any liability can arise the property involved must have been acquired from a "retailer". Following are extracts from certain sections of the Sales and Use Tax Law:

Section 6201:

"An excise tax is hereby imposed on the . . . use . . . of . . . property purchased *from any retailer.*"

Section 6202:

"every person . . . using . . . property *purchased from a retailer* is liable for the tax."

Section 6203:

"*Every retailer* . . . making sales of . . . property for . . . use . . . , not exempted under Chapter 4 of this part, shall, . . . collect the tax from the purchaser . . ."

Section 6204:

"The tax required to be collected by the *retailer* constitutes a debt owed by the *retailer to this State.*"

(3) Liability Under the Use Tax Law Is Exempted if for Constitutional Reasons no Sales Tax Could Have Been Assessed.

Section 6352 reads:

"There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use or other consumption in this State

of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the constitution of this State.”

The *Goggin* case, *supra*, clearly indicates that a taxation of liquidation sales by a Trustee would be unconstitutional. The foregoing section expressly provides that any taxes imposed by the Sales and Use Tax Law are exempted if the State is prohibited under the Constitution, or laws of the United States, from imposing either a sales tax or a use tax in connection therewith.

Under the *Goggin* case, the State is prohibited on Constitutional grounds from imposing a sales tax on the property liquidated by the Trustee. Therefore, no *use tax* can be imposed by the State against either the Trustee or the purchaser.

The foregoing becomes clear when it is observed that “this part” (in Sec. 6352) is the entire Sales and Use Tax Law (Secs. 6001-7176); that the exemptions feature of the law are contained in Chapter 4 (Secs. 6351-6421); and that Chapter 4 is divided into four (4) articles:

Article 1 (Secs. 6351-6368) entitled General Exemptions, which applies to *both* sales tax and use tax;

Article 2 (Secs. 6381-6387) entitled Exemption From Sales Tax, which applies merely to Sales Tax;

Article 3 (Secs. 6401-6403) entitled Exemption From Use Tax, which applies merely to Use Tax; and

Article 4 (Sec. 6421) entitled Exemption Certificates, which applies merely to Sales Tax.

(4) **Liability Under the Use Tax Law Is Exempted in Respect to Property Purchased From Any Unincorporated Agency or Instrumentality of the United States (With Exceptions Not Material).**

Provision for this exemption is made in Section 6402 which reads:

“The . . . use . . . of property purchased from any unincorporated agency or instrumentality of the United States . . . is exempted from the use tax.”

We have found no cases discussing the above section, but do raise the point that the Trustee is an arm of the United States District Court and one whose office is created by Section 33 of the Bankruptcy Act, *11 U. S. C. A. 61*, which reads:

“The offices of Referee and Trustee are created.”

(5) **A Requirement to Pay or Collect Any Tax or Debt Based on the Use Tax Law Would Constitute an Interference With Bankruptcy Administration.**

The *Goggin* case, *supra*, has already indicated that the imposition of a sales tax would constitute an interference with bankruptcy administration.

Pertinent sections of the Sales and Use Tax Law read as follows:

Section 6203:

“Retailer making sales of property, ‘not exempted under Chapter 4 of this part’ shall at time of making sale . . . or at time the storage, use or other consumption becomes taxable, collect the tax from the purchaser”

Section 6204:

“The tax required to be collected by the retailer constitutes a *debt* owed by the retailer to this State.”

Section 6244:

“If the purchaser who gives a certificate makes any storage or use of the property other than retention, demonstration or display, while holding it for sale in the regular course of business, the storage or use is taxable as of the date the property is first sold, stored, or used”

One effect of the above sections is that if the Trustee should sell the property to a purchaser for resale, the Trustee then would not be obliged to collect a use tax. However, if at some later time the purchaser should “use” the property, then a liability would be chargeable to the Trustee. The result would be that the Trustee would be obliged to keep an estate open for an indefinite period to ascertain whether a purchaser apparently immune of tax under Section 6203, had decided to use the property, thus creating a liability against the Trustee under Section 6244.

Language in the *Goggin* case, *supra*, to the following effect

“A tax on this taxation, whatever form it takes, is a tax on the process of the Court liquidating assets in accordance with Constitutional power. In another aspect, it may be considered as a license fee required of a Federal officer to make liquidation. In either event it is void But no State is empowered to levy taxes upon the process of the Courts of the United States or to impede the officers of Court in an essential judicial function.”

is brought into focus by language in the *Atcheson, Topeka & Santa Fe Railway Company v. State Board of Equalization*, 139 A. C. A. 447 at 457, 294 P. 2d 181, where the Court with approval quotes Justice Traynor's *article in 24 California Law Review*, 175, 176:

"It is the intent of the Use Tax merely to supplement the Sales Tax by imposing upon those subject to it a tax burden equivalent to that of the Sales Tax with the same specific exemptions in each case."

(6) The Property Involved Is Exempt as an "Occasional" Sale.

Pertinent sections are 6006.5(a):

"A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales, sufficient in number, scope, and character to constitute an activity requiring the holding of a seller's permit."

Section 6367:

"There are exempted from the taxes imposed by this part the gross receipts from occasional sales of tangible personal property and the storage, use or other consumption in this State of tangible personal property, the transfer of which to the purchaser is an occasional sale."

The *Goggin* case, *supra*, has held that the Trustee was not required to hold a seller's permit in order to carry on a liquidating sale which would mean that the instant sale was an occasional sale and that it is exempted therefore from use tax under Section 6367.

Conclusion.

We believe that it has been established that a liquidation sale by a Trustee in Bankruptcy is not subject to sales taxes and, therefore, is not subject to use taxes or debt, not only by the definition and conditions contained in the Sales and Use Tax Law itself, but also that any effort by the State to impose a Use Tax impedes the administration of the Bankruptcy Court and to that extent is unconstitutional.

The orders of the lower Courts should be affirmed.

Respectfully submitted,

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APPENDIX "A".

In the District Court of the United States, Southern District of California, Central Division.

In the Matter of Columbia Stamping and Manufacturing Corporation, Bankrupt No. 44,605-BH. Neu-Bart Stamping & Mfg. Co., Bankrupt No. 44606-BH.

MEMORANDUM OPINION

In this review of two similar orders made by the late Referee in Bankruptcy, Hugh L. Dickson, entered on October 22, 1954, in the above two companion cases, the court is faced with the recurring problem of the State Board of Equalization of the State of California, in its persistent efforts to interfere and interject itself into the affairs of the Bankruptcy Court. This time the vehicle is the "sales and use tax law" of the State of California as amended in 1951. This amendment was an obvious attempt to overcome the ruling in California State Board of Equalization v. Goggin, 191 F. 2d 726, and in Re Davis Standard Bread, 46 F. Supp. 41, and affirmed in 131 F. 2d 386.

It is my view that it makes no difference whether you call it a "sales tax" or a "use tax" or any other name that may be applied. The nomenclature is immaterial, the effect is the same.

I feel this case is controlled by State Board of Equalization v. Goggin, 191 F. 2d 726, and I am bound by the rulings of our Circuit Court, notwithstanding an apparent contrary ruling in the case of City of New York v. Jersawit, CCA, 2, 85 F. 2d 25.

The court adopts the findings of fact and conclusions of law made by referees in each case and the orders under review are affirmed. The trustee is directed to prepare and submit proper order for my signature.

Dated: This 19th day of May, 1955.

BEN HARRISON,
Judge

APPENDIX "B".

Each of the following sections, 6006.5(a) to 6402 is found in Revenue Laws of California:

Section 6006.5(a): "OCCASIONAL SALE." "Occasional sale" includes:

(a) A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit;

Section 6201: IMPOSITION AND RATE OF USE TAX.

An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this State at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent thereafter.

Section 6202: LIABILITY FOR TAX.

Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer maintaining a place of business in this State or from a retailer who is authorized by the board under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer maintaining a place of business in this State, given to the purchaser pursuant to Section 6203, is sufficient to

relieve the purchaser from further liability for the tax to which the receipt refers.

Section 6203: COLLECTION BY RETAILER.

Every retailer maintaining a place of business in this State and making sales of tangible personal property for storage, use or other consumption in this State, not exempted under Chapter 4 of this part, shall, at the time of making the sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

Section 6204: TAX AS DEBT.

The tax required to be collected by the retailer constitutes a debt owed by the retailer to this State.

Section 6241: PRESUMPTION OF PURCHASE FOR USE:
RESALE CERTIFICATE.

For the purpose of the proper administration of this part and to prevent evasion of the use tax and the duty to collect the use tax, it shall be presumed that tangible personal property sold by any person for delivery in this State is sold for storage, use, or other consumption in this State until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

Section 6242: EFFECT OF CERTIFICATE.

The certificate relieves the person selling the property from the burden of proof only if taken in good faith from a person who is engaged in the business of selling tangible

personal property and who holds the permit provided for by Article 2, Chapter 2, of this part and who, at the time of purchasing the tangible personal property, intends to sell it in the regular course of business or is unable to ascertain at the time of purchase whether the property will be sold or will be used for some other purpose.

Section 6244: LIABILITY OF PURCHASER.

If a purchaser who gives a certificate makes any storage or use of the property other than retention, demonstration or display while holding it for sale in the regular course of business, the storage or use is taxable as of the time the property is first so stored or used. If the sole use of the property, other than retention, demonstration, or display in the regular course of business, is the rental of the property while holding it for sale, the purchaser may elect to pay the tax on the use measured by the amount of the rental charged rather than the sales price of the property to him.

Section 6351: "EXEMPTED FROM THE TAXES IMPOSED BY THIS PART."

"Exempted from the taxes imposed by this part," as used in this article, means, in case of the sales tax, exempted from the computation of the amount of tax imposed.

Section 6352: CONSTITUTIONAL EXEMPTIONS.

There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

Section 6367: OCCASIONAL SALES.

There are exempted from the taxes imposed by this part the gross receipts from occasional sales of tangible personal property and the storage, use, or other consumption in this State of tangible personal property, the transfer of which to the purchaser is an occasional sale.

Section 6402: PROPERTY PURCHASED FROM UNITED STATES.

The storage, use or other consumption in this State of property purchased from any unincorporated agency or instrumentality of the United States, except (a) any property reported to the Surplus Property Board of the United States, or to any agency succeeding to the functions of that board, as surplus property by any owning agency and (b) any property included in any contractor inventory, is exempted from the use tax.

“Surplus property,” “owning agency,” and “contractor inventory” as used in this section have the meanings ascribed to them in that act of Congress of the United States known as the Surplus Property Act of 1944.

Title 28 U.S.C.A. 960 (formerly Title 28, Sec. 124a):

Section 960: TAX LIABILITY.

Any officers and agents conducting any business under authority of a United States Court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation. June 25, 1948, c.646, 62 Stat. 927.

